

**MAPPING THE LEGACY OF THE PAST:  
COLONIAL LAWS AND CUSTOMARY TRADITIONS IN AFRICA**

Por

MATTEO NICOLINI

Universidad de Verona (Italy)

Newcastle University Law School (UK)

[matteo.nicolini@univr.it](mailto:matteo.nicolini@univr.it)

*Revista General de Derecho Público Comparado* 26 (2019)

**ABSTRACT:** The essay offers a critical survey of how comparative legal studies examine the interrelations between colonial legacies and African legal traditions. By challenging the colonial and ethnocentric attitude of mainstream comparative legal scholars, it reappraises the traditional classification of African law. Anchoring the article there are two critical contentions: firstly, that African law is a composite of different legal traditions; secondly, that critical comparative law must redraw the boundaries between the different geographical areas within which colonial legacies and African law intertwines.

**KEY-WORDS:** Colonial law; Critical comparative law; Colonial bias; Malagasy law; Tropical law; Southern African law

**SUMMARY:** I. AFRICAN LEGAL TRADITIONS: A STRUGGLE FOR RECOGNITION. – II. AFRICAN LAW AND THE BIASES OF COMPARATIVE LAW. – III. LOCATING AFRICAN LEGAL SYSTEMS. – IV. AFRICAN LAW: BIASES, STRATIFICATION AND EVOLUTION. – V. “PLURAL” LAW: AFRICAN LEGAL TRADITIONS. – VI. CRITICAL COMPARATIVE LAW AND THE PLACE OF AFRICAN LEGAL TRADITIONS.

**DIBUJAR LAS HERENCIAS DEL PASADO:  
DERECHO COLONIAL Y TRADICIONES JURÍDICAS EN ÁFRICA**

**RESUMEN:** El ensayo ofrece un análisis crítico del Derecho africano y su consideración por parte de los estudios comparativos tradicionales. Se trata de una novedosa lectura de las interacciones entre el Derecho trasladado a África durante el periodo colonial y Derecho africano tradicional. El artículo desvela las actitudes coloniales y etnocéntricas sobre que se han ido construyendo las clasificaciones del mismo Derecho africano en Derecho comparado. Pues bien, el texto se centra en dos supuestos fundamentales: en primer lugar, el Derecho africano es un derecho plural, una verdadera familia de sistema jurídicos; en segundo lugar, se debe encomendar a los estudios de

*critical comparative law* la tarea de trazar nuevos confines y demarcar las distintas áreas geográficas en que se da la relación entre herencias coloniales y tradición jurídica africana.

**PALABRAS CLAVES:** Derecho colonial, Derecho comparado, Prejuicios coloniales; Derecho de Madagascar; Derecho tropical; Derecho de África austral

**SUMARIO:** I. TRADICIONES JURÍDICAS AFRICANAS: LA LUCHA PARA EL RECONOCIMIENTO – II. DERECHO AFRICANO Y DERECHO COMPARADO. – III. LA CLASIFICACIÓN DE LOS SISTEMAS JURÍDICOS AFRICANOS. – IV. ESTRATIFICACIÓN Y EVOLUCIÓN DEL DERECHO AFRICANO. – V. DEL DERECHO AFRICANO A LAS TRADICIONES JURÍDICAS AFRICANAS. – VI. PLURALISMO ENTRE LOS SISTEMAS JURÍDICOS AFRICANOS.

Fecha recepción: 21/11/2019

Fecha aceptación: 30/11/2019

## **I. AFRICAN LEGAL TRADITIONS: A STRUGGLE FOR RECOGNITION**

The article offers a critical survey of how comparative legal studies examine the interrelations between colonial legacies and African legal traditions. By challenging the colonial and ethnocentric attitude of mainstream comparative legal scholars, it reappraises the traditional classification of African law. The article argues that African law is a composite of different legal traditions; and that critical comparative law helps us to redraw the boundaries between the different geographical areas within which colonial legacies and African law intertwines.

Before demarcating these areas, however, further reflection on African law is required. In particular, I will try to reappraise the place of both African law and African Legal Traditions among the legal systems of the world.

African law gained official, albeit limited, recognition in the colonial era. Such recognition was caused by the 'West African Conference' in Berlin (1884–1885). There, European powers relinquished their informal empires<sup>1</sup> and laid down the rules for the partition of the continent, and the exploitation of her natural resources. It is the "scramble for Africa", which was concluded when the French Protectorate over Morocco was declared in 1912.<sup>2</sup> The first attempts to define African law date back to this period: the expression designates a set of legal rules applicable to groups and communities and, within them, to individuals. African law thus comprises both public and private law. Not only did law-

---

<sup>1</sup> R. Robinson et al., *Africa and the Victorians. The official mind of imperialism*, MacMillan, London, 1961; M. Lynn, "British Policy, Trade, and Informal Empire in the Mid-Nineteenth Century", in *The Oxford History of the British Empire*, ed. Andrew Porter, vol III, *The Nineteenth Century*, Oxford UP, Oxford, 2001, pp. 101–121.

<sup>2</sup> See R. Reid, J. Parker, "Introduction. African Stories. Past, Present, and Future," in *The Oxford Handbook of Modern African History*, ed. Richard Reid and John Parker, Oxford UP, Oxford, 2013, p. 1. On the colonial partition, and on the conventional end-dates for the Scramble of Africa (Italy's invasion of Libya: 1911; the French Protectorate over Morocco: 1912; the Peace of Vereeniging ending the South African war: 1899-1902) see H. J. Sharkey, "African Colonial States", in *The Oxford Handbook of Modern African History*, pp. 153-154; J. F. Gjernsø, "The Scramble for East Africa: British Motives Reconsidered, 1884-95," *The Journal of Imperial and Commonwealth History*, 43.5, 2015, pp. 831–860; I. Griffiths, "The Scramble for Africa: Inherited Political Boundaries," *The Geographical Journal*, 152.2, 1986, pp. 204–216; G. N. Sanderson, "The European partition of Africa: Coincidence or conjuncture?," *The Journal of Imperial and Commonwealth History*, n. 3, 1974, pp. 1–54.

making, marriage, kinship, law of obligations, evidence and land law fall under this legal descriptor, but colonial approaches towards them also varied enormously.

France's colonial policy and *mission civilisatrice* endeavoured to assimilate African natives by deliberately propagating "the best of French culture along with the rationalist and libertarian values deriving from the Enlightenment and French revolution"<sup>3</sup>. It also forged the *indigénat*: this had been originally established in Algeria in 1881; applied across French colonies, it was abolished in 1946. The *indigénat* neither recognised indigenous legal systems nor recollected customary law; by merely defining "the very status of 'native'", it listed the "offenses that 'by definition' only 'natives' could commit"<sup>4</sup>. As far as French colonial governance is concerned, the revolutionary principles – that is, *Liberté*, *égalité*, *fraternité* – may well have been of relevance only at home: "None but Frenchmen should go to the colonies of 'Liberty, Equality, and Fraternity'; for there is Little Liberty, less Equality, and no Fraternity in the French colonies for Whites or Blacks."<sup>5</sup>

Portugal did the same in its colonies. Under any circumstances were Africans granted a legal status consistent with the revolutionary principles: slavery and inequality permeated colonial society. Furthermore, vagrancy acts forced ex-slaves to work on the plantations. Members of colonial societies were then ranked as if they belonged to a castelike systems: the landlords were the metropolitan citizens; the gentry of Creole descent were named *forros*; slaves and ex-slaves were set at the margins of the legal systems<sup>6</sup>.

In South Africa, the Boer Republics of Transvaal and Orange Free State recognised customary law in 1885. With the creation of the Union of South Africa (1910), recognition resulted even more troublesome: there was "complete non-recognition in the Cape, limited application in the Transvaal and full recognition and application in Natal and the Transkeian territories"<sup>7</sup>. African customary law obtained full recognition with the implementation of apartheid. The *South African Native Administration Act* (Act No 38 of 1927) recognised customary law and established a separate system of courts for Africans with the main purpose of fostering separateness among the different races living within the Dominion.

African indigenous law was granted limited application in Tropical Africa. In British colonies – and, to a lesser extent, in Spanish colonies –, this was facilitated by the indirect rule, i.e. a method of

---

<sup>3</sup> H.J. Sharkey, "African Colonial States", in *The Oxford Handbook of Modern African History*, ed. Richard Reid and John Parker, Oxford UP, Oxford 2013), pp. 153-154.

<sup>4</sup> G. Mann, "What was the "Indigénat"? The "Empire of Law" in French West Africa", *The Journal of African History*, 50, n. 3, 2009, p. 336.

<sup>5</sup> For a critical evaluation of French colonial policy see Sir J. Harris, *Dawn in Darkest Africa*, Smith, Elder & Co., London, 1912, p. 97.

<sup>6</sup> H. Varela, "Entre sueños efímeros y despertares: la historia colonial de São Tomé y Príncipe (1485-1975)", *Estudios de Asia y África*, 32, 2, 1997, p. 291, 294 y 300.

<sup>7</sup> E. Grant, "Human Rights, Cultural Diversity and Customary Law in South Africa", *Journal of African Law*, 50, n. 1, 2006, p. 13. See *African Customary Law in South Africa. Post-Apartheid Living Law Perspectives*, ed. Chuma Himonga and Thanda Nhapo, Oxford UP Southern Africa, Cape Town, 2014, pp. 9-13.

administration whereby natives were associated to colonial governance<sup>8</sup>. In British Africa, “there was the acceptance of the idea that *some* Africans could become members of the governing class of colonial Africa, and thence the extension to [them] of training in a neo-traditional context”<sup>9</sup>.

The limited recognition of African legal systems is usually traced back to its intrinsic features. Not only does African law comprise a variety of systems of law, but it is also handed down by means of oral transmission. The tradition is passed on to future generations “by African griots, the bards charged with remembering and passing along a society’s history and tradition through story and song”<sup>10</sup>.

Law-making is then a communal performance. As s 3(3)(c) *Traditional Authorities Act 25 of 2000* (Namibia) states, “In the performance of its duties and functions [...] a traditional authority may [...] make customary laws”. Hence, legislators act as “poets and singers” on behalf of the whole society<sup>11</sup>. The same “legal wisdom” is then sung by “poets and singers”, whose “subversive potential [is] expressed by the ... traditional performance of curse”<sup>12</sup>.

These features hardly squared with the Western legal mentality and colonial policies. Since oral transmission might well have favoured contrasting interpretations of customary law, in dispute resolutions colonial agents depended on native assessors, i.e. “reliable informants” on customary law<sup>13</sup>. Furthermore, local variations in customary law were reduced through legislative action and restatement, whereby customary rules were recollected in written form and accommodated to the colonial legal framework. In addition, European colonial authorities established legal dualism, within which customary law and European law coexisted. Their mutual interactions were arranged upon a hierarchical scale: according to the repugnancy clauses appended to restated law, African law was applied to the extent that it was not “contrary to justice and humanity”<sup>14</sup>. In the event of inconsistency between European law and African law, the former prevailed.

A new approach emerged in the 1950s and 1960s in the wake of decolonisation. The newly independent African countries addressed the topic within the broader framework of the dualistic legal regime they had received during the colonial era. There was continuity between the colonial past and

---

<sup>8</sup> See F.D. Lugard’s seminal book *The Dual Mandate in British Tropical Africa*, William Blackwood and Sons, Edinburgh, 1922, pp. 192-213; *Law in Colonial Africa*, ed. by Kristin Mann and Richard Roberts, Heinemann-James Currey, Portsmouth, NH, and London, 199, p. 20.

<sup>9</sup> T. Ranger, “The Invention of Tradition in Colonial Africa”, in E. Hobsbawm, T. Ranger (eds.), *The Invention of Tradition*, Cambridge, Cambridge UP, 1983, pp. 220-221.

<sup>10</sup> J.S. Gentile, “The Mythic Storyteller: Word-Power and Ambivalence”, *Storytelling, Self, Society*, Vol. 7, No. 2, Special Issue: Storytelling and Myth, 2011, p. 149.

<sup>11</sup> P. Leman, “Singing the Law: Okot p’Bitek’s Legal Imagination and the Poetics of Traditional Justice”, *Research in African Literatures*, 40, n. 30, 2009, p. 109.

<sup>12</sup> L. Lanzoni, “The *Trial of Jomo Kenyatta* by Montagu Slater: Oral Tradition and Fundamental Rights”, in I. Ward (ed.), *Literature and Human Rights. The Law, the Language and the Limitation of the Human Right Discourse*, de gruyter, Berlin et al., 2015, p. 230.

<sup>13</sup> J. Ubink, “The Quest for Customary Law in African State Courts”, in *The Future of African Customary Law*, ed. JeanMarie Fenrich et al., Cambridge UP, Cambridge, 2010, p. 96. On *native assessors* see, among others, s 48 *Indian Evidence Act*, 1872; s 19 *Supreme Court Ordinance* 1876 (Ghana); s 8 *Swaziland High Court Proclamation* 1938; and s 222 *Criminal Procedure Act of Northern Rhodesia* 1939.

<sup>14</sup> See, among others, s 12(1)(a) *Local Courts Act* 1966, Act No. 20 of 1966 (Zambia).

independent Africa. At the same time, African law entailed a full understanding of its cultural underpinnings: it became a cross-disciplinary field of research for legal scholars, anthropologists and legal anthropologists<sup>15</sup>.

The winds of democratic change, which blew over Africa after the dismantlement of apartheid and the end of the Cold War, favoured the transition of several states from authoritarian rule to democratic regimes; the adoption of new constitutions soon followed<sup>16</sup>. Customary law, which had been displaced by Western legal paradigms for decades, gained new ground and became the subject of renewed legislative and judicial actions.

## II. AFRICAN LAW AND THE BIASES OF COMPARATIVE LAW

The recognition of African law did not have any significant bearing on comparative legal research: scholars still locate African law at the margins of comparative legal studies.

Although they are interested in African legal systems<sup>17</sup>, comparative legal scholars are affected by a methodological bias: they still preserve a colonial attitude towards non-Western conceptions of the law. Ethnocentrism advocates the superiority of European legal paradigms. As a part of their politico-legal colonial projects<sup>18</sup>, European powers shaped African legal cartography and superimposed their own spatiality of law onto the continent; peoples, communities, territories and collective legal wisdom still bear the consequences of colonial domination.

Despite the increasing interest in customary law, comparative law still focuses on the legal-colonial links between former African colonies and Western legal systems. French, Spanish, Portuguese and Italian former colonies are numbered among the civil-law legal systems; former British colonies and protectorates are part of the common-law legal tradition, whereas Southern African countries, Mauritius and the Seychelles join the mixed jurisdictions<sup>19</sup>.

---

<sup>15</sup> S. Roberts, *Order and Dispute: An Introduction to Legal Anthropology*, Penguin, London, 1979; J. Vanderlinden, *Anthropologie juridique*, Dalloz, Paris, 1996; *La Quête Anthropologique du Droit: Autour de la Démarche d'Étienne le Roy*, eds. Christoph Eberhard and Geneviève Vernicos, Karthala, Paris, 2006.

<sup>16</sup> See the articles published in *Journal of African Law*, 35, n. 1/2, 1991, issue on "Recent Constitutional Developments in Africa", and J. Richard, "Democratization in Africa after 1989: Comparative and Theoretical Perspectives", *Comparative Politics*, 29, n. 3, 1997, p. 363.

<sup>17</sup> See, among others, U. Kischel, *Comparative Law*, Oxford UP, Oxford, 2019; G. Ajani *et al.*, *Diritto comparato. Lezioni e materiali*, Giappichelli, Turin, 2018; T. Rambaud, *Introduction au droit comparé*, 2nd ed., PUF, Paris, 2017; R. David *et al.*, *Les grands systèmes de droit contemporains*, 12th ed., LGDJ, Paris, 2016; R. Sacco, "The sub-Saharan legal tradition", in *The Cambridge Companion to Comparative Law*, ed. by Mauro Bussani and Ugo Mattei, Cambridge UP, Cambridge, 2012), p. 313 ff.; A. Gambaro, R. Sacco, *Sistemi giuridici comparati*, 2nd ed., UTET, Turin, 2009; T.W. Bennett, "Comparative Law and African Customary Law", in *The Oxford Handbook of Comparative Law*, eds. by Matthias Reimann and Reinhard Zimmermann, Oxford UP, Oxford, 2006; W.F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge UP, Cambridge, 2006; C. Ntampaka, *Introduction aux systèmes juridiques africains*, Presses Universitaires de Namur, Namur, 2005. As for monographs see J. Vanderlinden, *Les Systèmes juridiques africains*, PUF, Paris, 1983; R. Sacco, *Il diritto africano*, UTET, Turin, 2006.

<sup>18</sup> See D. Kennedy, "Political ideology and comparative law", in *The Cambridge Companion*, cit., p. 40.

<sup>19</sup> See G. Bamodu, "Transnational Law, Unification and Harmonization of International Commercial Law in Africa", *Journal of African Law*, 38, n. 2, 1994, p. 127; R. Zimmermann, D. Visser, "Introduction. South African Law as a Mixed Legal System", in *Southern Cross: Civil Law and Common Law in South Africa*, ed. by Reinhard Zimmermann and Daniel Visser, Clarendon, Oxford, 1996, pp. 7-8. On African mixed jurisdictions see *Mixed*

According to Ethnocentrism, inferior systems do not have anything to teach superior systems. This accounts for the limited extension of chapters on African law in comparative-law manuals. This indeed refer to African law; however, references are often superficial and confined within either classifications of the legal systems or micro-comparative analyses. Even when scholars suggest the adoption of new taxonomies, methodological biases are apparent. Suffice it to remember Glenn's taxonomy: the prominent comparative legal scholar advocates the establishment of the chthonic legal tradition, into which several pre-colonial legal traditions (i.e. African, Asian, Polynesian and Inuit) coalesce<sup>20</sup>. However, Glenn's taxonomy does not reflect the variety of 'non-Eurocentric conceptions of the law': within the chthonic milieu, African law loses its own legal-specific features.

Ethnocentrism also affects how comparative scholars outline African legal systems within their handbooks. Both Africa and its legal traditions are depicted as an indistinct whole: scholars usually refer to them as either 'The sub-Saharan legal tradition' or 'African law' or 'The African family of legal systems'<sup>21</sup>. There is a clear precinct separating 'customary' African law from Northern Africa (and its Islamic legal tradition): it is the Sahel region, which severs Tropical Africa from the lands located to the north of the sand belt. It may be argued that this precinct is geographical rather than legal, and therefore not applicable when demarcating African legal traditions. Nor are political yardsticks of any practical use: as almost all African states are members of the African Union (AU) – which replaced the Organisation of African Unity (OAU) in 2001 –, the geopolitical alignment still leads scholars to conceive of Africa as an 'indistinct whole', thus drawing a veil over the varieties of its legal systems.

According to this ethnocentric attitude, 'superior' European systems had the duty to nurture changes in African 'inferior' law. European colonial law promoted "social engineering", i.e. the economic development, modernisation and transformation of indigenous African societies<sup>22</sup>. For this purpose, colonial agents forged new institutions whereby African societies could be both governed and 'civilised': chiefs, tribes and customary courts are "invented traditions", which "became in themselves realities through which a good deal of colonial encounter was expressed"<sup>23</sup>.

Modernisation was also achieved by backing official customary law and the progressive amalgamation of its local variations. Its unification was achieved by fostering either 'codification' or 'restatement'. Whereas codification incorporates customary law and, at the same time, abolishes it in

---

*Jurisdictions Worldwide*, ed. Vernon V. Palmer, 2nd ed., Cambridge UP, Cambridge, 2012), p. 625; J. du Plessis, "Comparative Law and the Study of Mixed Legal Systems", in *The Oxford Handbook*, cit., p. 484.

<sup>20</sup> H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed., Oxford University Press, Oxford, 2014, p. 60. However, K. Zweigert, H. Kötz, *Einführung in die Rechtsvergleichung*, 3rd ed., J.C.B. Mohr Siebeck, Tübingen, 1996 and C. Valcke, *Comparing Law. Comparative Law as Reconstruction of Collective Commitments*, Cambridge University Press, Cambridge, 2018 completely omit references to African law.

<sup>21</sup> See K. M'Baye, "The African Conception of the Law", in *International Encyclopedia of Comparative Law*, volume II, *The Legal Systems of the World. Their Comparison and Unification*, ed. René David (chief editor) (Tübingen et al.: J.C.B. Mohr, 1976), p. 138; A.N. Allott, "African Law", in *An Introduction to legal systems*, ed. by J. D. M. Derrett (London: Sweet & Maxwell, 1968), pp. 131 et seq.; R. Sacco, "The sub-Saharan legal tradition", cit. p. 313 ff.; C.M. Fombad, *The Botswana Legal System*, Lexis Nexis, Durban, 2013, p. 48. On such inaccuracy see J. Vanderlinden, "Ex Africa Semper", *Revue internationale de droit comparé*, 58, n. 4, 2006, p. 1187.

<sup>22</sup> A.N. Allott, "Law in the New Africa", *African Affairs*, 66, 262, 1967, p. 55; L.P. Mar, "Social Change in Africa", *International Affairs*, 36, n. 4, 1960, p. 447; S.N. Eisenstadt, "Social Change and Modernization in African Societies South of the Sahara", *Cahiers d'études africaines*, 5, 19, 1965, p. 453.

<sup>23</sup> T. Ranger, "The Invention of Tradition in Colonial Africa", cit., pp. 211, 212.

the fields which it covers, restatement does not entail any legislative activity: it merely rearranges, in written form, the existing law, thus offering a “comprehensive account of a branch of the law which is unwritten or is scattered between a variety of sources”<sup>24</sup>. The results are particularly interesting: in Madagascar (1957), Senegal and Tanganyika (1961), Kenya (1968-1969) and Malawi (1970-1971), restatement altered, i.e. modernised, ‘native’ customary law. This brought changes in native customary law and mitigated the strictures of native customary law by infusing European values, such as individualism and liberalism, into the traditional systems, which favoured the relaxation of social inequalities of group-centered traditional societies: “the days of African customary law as a fully-fledged legal system are gone”<sup>25</sup>.

Restatement of African law also had its critics. On the one hand, “rules were not only reproducible, but unalterable; codification ‘crystallized’ customary law”; on the other hand,

a crystallized, unalterable customary law would allow them little room to adjust the law in order to control local African courts and, by extension, African societies. In the same way, a non-codified customary law meant that only those who ‘knew the African’, that is, district officers, could preside over intra-African legal matters ... The state did not create and crystallize customary law, but allowed it to remain fluid and situational”<sup>26</sup>.

Like social engineering, restatement of ‘liberal’ customary law is a legacy of the colonial era. The first attempts to modernise it date back to the early twentieth century: Germany started restating Tanganyikan family law in 1907 – and the process was subsequently carried on by the United Kingdom in the 1940s<sup>27</sup>. The “School of Oriental and African Studies” (SOAS) of London fostered its own *Restatement of African Law Project* in 1959: this was a comprehensive pattern for the study and restatement of African customary law of 16 Anglophone countries in the fields of land tenure, succession, family law and status of women. The colonial legacy is apparent, because the project was delivered in London. In the aftermath of decolonisation, the task of modernising African law was resumed by the *Law and development* movement, whereby European and U.S. legal and economic assistance aimed to develop African countries by imposing their own legal paradigms<sup>28</sup>.

Africa is currently experiencing new forms of legal unification, which stem from supranational integration and trigger the creation of ‘African transnational law’. Among them, there is the *Organisation for the Harmonisation in Africa of Business Law* (*Organisation pour l’Harmonisation en*

---

<sup>24</sup> M.W. Prinsloo, “Restatement of Indigenous Law”, *The Comparative and International Law Journal of Southern Africa*, 20, n. 3, 1987, p. 411. For codification, see, among others, the Civil Code of Ethiopia (1960) and the 1964 Land Tenure Law (*Loi sur le Domain National*) (Senegal).

<sup>25</sup> A.A. Oba, “The Future of Customary Law in Africa”, in *The Future of African Customary Law*, ed. JeanMarie Fenrich et al. (Cambridge: Cambridge University Press, 2010), p. 79.

<sup>26</sup> B. L. Shadle, “Changing Traditions to Meet Current Altering Conditions’: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60”, *The Journal of African History*, Vol. 40, N°. 3, 1999, p. 413.

<sup>27</sup> H. Sippel, “Customary family law in colonial Tanganyika: a study of change and continuity”, *The Comparative and International Law Journal of Southern Africa*, 31, n. 3, 1998, p. 378.

<sup>28</sup> J.H. Merryman, “Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement”, *The American Journal of Comparative Law*, 25, n. 3, 1977, p. 457.

*Afrique du Droit des Affaires* – OHADA), a supranational union founded in 1993 by French-speaking countries which mimicks the EU. Like the OHADA, the *Common Market for Eastern and Southern Africa* (COMESA) is a process of supranational integration with economic and legal implications, among which the harmonisation of commercial law, in general, and contract law, in particular. Legal harmonisation is also the objective of several regional integration processes, such as the *East African Community* (EAC), the *Southern Africa Development Community* (SADC) and the *Economic Community Of West African States* (ECOWAS). Harmonisation entails the convergence of both state and customary laws in order to stimulate business and economic development<sup>29</sup>.

### III. LOCATING AFRICAN LEGAL SYSTEMS

Together with unification and restatement, the modernisation of customary law may be ascribed to the ethnocentric attitude which still engulfs comparative research. However, the methodological bias discloses a vast array of colonial underpinnings, which reflect the narratives of superiority and domination elaborated by European powers in the last few decades of the nineteenth century. This means that it is impossible to categorically exclude “the ideological factor in constructing” and classifying African legal systems and traditions<sup>30</sup>.

As the processes of socio-legal engineering mentioned above uphold, domination and colonialism have common features: the latter is a species of the broader concept of domination, which endeavoured to impose ‘superior’ legal orders to the subordinate African legal systems.

The links between law and development also have a huge impact on classifications. How the varieties of legal systems are ranked depends, *inter alia*, on their performativity, which is in turn deep-rooted in their legal origins<sup>31</sup>. The Western legal tradition is dominant, and, within it, the common law prevails over the civil law because the latter is said to ensure elevated economic performances. Like Western societies, African societies might attain economic performativity provided that they evolve through various stages of development that are universal and lead to the same stage of superiority envisaged by European comparative legal traditions. What lies beneath such a predicament is the implicit assumption that the Western conception of the law is a universal legal paradigm ‘superior’ to the African legal paradigms.

Such a narrative of superiority is apparent as regards both ‘native’ African systems and ‘received’ European systems. Not only did mixed jurisdictions replace the customary law substrate in Southern

---

<sup>29</sup> See S. Mancuso, “Trends on the Harmonisation of Contract Law in Africa”, *Annual Survey of International & Comparative Law*, 13, n. 1, 2007, p. 165; T. Shumba, “Revising legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty”, *Law Democracy & Development*, 19, 2015, p. 127.

<sup>30</sup> D. Kennedy, “Political ideology, cit., p. 37.

<sup>31</sup> See D. Klerman, P.G. Mahoney, “Legal origin”, *Journal of Comparative Economics*, 35, 2007, p. 278; M. Siems, “Varieties of legal Systems: Towards a New Global Taxonomy?”, *Journal of Institutional Economics*, 12, 2016, p. 579; V. Grosswald Curran, “Comparative Law and the Legal Origins Thesis: ‘[N]on scholae sed vitae discimus’”, *The American Journal of Comparative Law*, 57, n. 4, 2009, p. 863; D. Oto-Peralía, D. Romero-Ávila, *Legal Traditions, Legal Reforms and Economic Performance. Theory and Evidence*, Springer, Wien, 2017, p. 85, p. 121.



Africa, Mauritius and the Seychelles, but these 'received' laws are also deemed to be inferior to European legal systems.

This ranking approach to legal systems is also applied within 'native' African law. According to the majority of comparative legal scholars, African law is a complex legal reality where several strata overlap and each layer is superimposed onto the others: these are the traditional (or pre-colonial) stratum, the religious stratum, the colonial and the post-colonial strata<sup>32</sup>.

Stratification entails that African law has progressively evolved through various stages with the Western legal paradigm as the natural end point. It should be argued, however, that the post-colonial or independence stratum – which stands above all other layers – does not only imitate European legal paradigms (such as constitutionalism, rule of law, enforcement of rights), but also embeds the revival of African traditional legal values. Such a revival also characterises supranational legal harmonisation: OHADA's Uniform Acts on Contract Law and on General Commercial Law refer to custom, which, within the African context, also styles customary law as a source of obligations<sup>33</sup>.

#### IV. AFRICAN LAW: BIASES, STRATIFICATION AND EVOLUTION

The interweaving of legal strata discloses other substantive effects of Ethnocentrism. Stratification makes it possible to discretely analyse the different strata and, within the pre-colonial layer, to study legal arrangements prior to the contact with other civilisations. This also makes it possible to detect commonalities among different pristine African legal systems. This is not to deny that African societies followed divergent politico-legal patterns: comparative scholars and legal anthropologists usually draw a distinction between acephalous societies, which lacked a centralised political power (such as the Pygmies and the Wala people in Upper Ghana), and those communities (the Akan or the Birim-Volta, for example), whose societal arrangements were highly structured and possibly influenced by Northern African civilisations.<sup>34</sup> Legal anthropological research focuses on how supernatural and magico-religious beliefs forged socio-legal relationships in pre-colonial African law, thus playing a major role as far as laws relating to kinship, evidence and inheritance were concerned<sup>35</sup>. Supernatural entities also give a reason for the role ancestors were granted within family groups and settlements: they were (and still are) part of the community, and therefore actively engaged in both lawmaking and dispute resolution. Not only does it enhance the role of kinship, but it also emphasises the centrality of the group over individuals and explains the relevance of marriage settlements (e.g. the bride price)

---

<sup>32</sup> Among others, see R.B. Seidman, "Law and Stratification: The African Case", *Contemporary Crises*, 3, 1979, p. 17; R. Sacco, "The sub-Saharan legal tradition", cit., p. 314; A.A. Oba, "The Future of Customary Law in Africa", cit., p. 58.

<sup>33</sup> See Art 194 of OHADA Uniform Act on Contract Law and Arts 238-239 of OHADA Uniform Act on General Commercial Law.

<sup>34</sup> "Screened by a tropical forest from the north and facing the Gulf of Guinea, the region remained isolated from external influences [...] creating specific systems of state law": I. Sinitsina, "African Legal Tradition: J. M. Sarbah, J. B. Danquah, N. A. Ollennu", in *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*, vol 1, ed. A. Dundes Renteln, Madison: The University of Wisconsin Press, 1994, p. 264.

<sup>35</sup> O. Elias, *The Nature of African Customary Law*, Manchester University Press, Manchester, 1955, pp. 228-238; R. Sacco, "The sub-Saharan Legal Tradition", cit., p. 315.

when it comes to constituting bonds between families – or among families, as far as polygamous marriages are concerned<sup>36</sup>.

African legal systems certainly share common features. By emphasizing their unifying traits, scholars obscure Africa's pluralistic mosaic and mask its diatopic variation. Despite the superimposition of homogeneous colonial and post-colonial strata, the different strata are so imbricated that it is impossible to disentangle – and therefore study – them as if they were in watertight compartments.

The interweaving of the different strata is particularly apparent when it comes to considering statehood as the major legacy Europeans handed over to African communities. Boundaries were unfamiliar to African conceptions of the law; they were also incompatible with traditional societal organisation, which was primarily built upon family settlements and non-territorial arrangements. However, colonial policy disregarded borderless, communal arrangements: since they were divided among different states, communities were arbitrarily separated and subsequently merged with other groups with the aim of creating political entities based on territorial jurisdictions. When the representatives of the newly independent African states met in Addis Ababa in 1963 in order to create the OAU, they immediately conformed to the status quo.

Interactions between traditional and colonial strata often cross the public-private divide. This is apparent as far as African land law is concerned: the African land tenure system was mainly communal and governed by both supernatural entities and the group; therefore, there was no room left for Western possessive individualism. The rise of trade pushed for its suppression – or, at least, reduction –, “because the land market could not fit with ideas regarding the communal nature of African land tenure”<sup>37</sup>. In the aftermath of decolonisation, Western, i.e. individual, land titles were retained and colonial laws regarding customary lands were adapted to the African context: land acts transformed former communal lands into public lands, such as in Tanzania and Ghana. Like in England, Tanzanian legislation assigns the land to the Head of State (the President), who acts as trustee on behalf of all citizens: the latter “cannot own land, but they can own rights over the land,” which “may be bought or sold, and inherited, and can thus be seen as (limited) decision-making rights”. The 1992 Constitution of Ghana does the same: “All public lands in Ghana shall be vested in the President on behalf of, and in trust for, the people of Ghana”; whereas “stool lands”, which the communal stool (the stool) granted to its own people, are vested “in the appropriate stool on behalf of, and in trust for, the subjects of the stool in accordance with customary law and usage”<sup>38</sup>.

---

<sup>36</sup> The role of individuals depends on their position in the group to which they belong: T. Rambaud, *Introduction au droit comparé*, 2nd ed., Presses Universitaires de France, Paris, 2017, p. 258; R. David *et al.*, *Les grands systèmes de droit contemporains*, cit., p. 483.

<sup>37</sup> S.F. Joireman, “Entrapment or Freedom: Enforcing Customary Property Rights Regimes in Common-Law Africa”, in *The Future of African Customary Law*, cit., p. 298.

<sup>38</sup> ss 255(1) and 167(1) of the 1992 Constitution (Ghana); *Loi no 034-2009/AN du 16 juin 2009 portant régime foncier rural* (Burkina Faso); URT, *Land Act* (No. 4), sec. 7 and URT, *Village Land Act* (No. 5), sec. 8(1), 12(1) (Tanzania). For more on the three land classes in Tanzania ('General Land', 'Reserved Land' and 'Village Land') see T.M. Locher, “How come others are selling our land? Customary land rights and the complex process of land acquisition in Tanzania”, *Journal of Eastern African Studies*, 10, n. 3, 2016, pp. 395-96. On the supernatural see M. Hamer, “Stool Rights” and Modern Land Law in Ghana: A Geographical Perspective on the Transformation of Tradition”, *Africa Spectrum*, 33, n. 3, 1998, p. 311.

Supernatural entities and societal structures are also relevant when it comes to settling disputes or performing the most relevant legal deeds. Marriage, divorce, adoption, guardianship, inheritance, acknowledgment of either cession or acquisition of rights over the land, and other acts made or taken are considered legal, valid and binding provided that they are performed before the whole community. In Madagascar, for example, Malagasy law and custom (*fomba*) has always been part of its dualistic legal system together with French-derived law. In the wake of the revival of customary law, the Preamble to the 2010 Constitution enshrines both traditional law and the system of village councils (*Fokon'olona*), where men and women that are descendants of a single ancestor and live within the same territory (*Fokon'tany*) gather. Acting as a notary, the community embodies the local rule-making process (*Dina*) and secures the validity of the most relevant legal deeds; these thus become part of the collective legal wisdom and are handed down to future generations.<sup>39</sup>

Unlike continental customary laws, Malagasy law thus tolerates limited forms of women's participation in communal rule-making processes. We have already noticed that customary law tends to preserve social inequality by 'lawfully' discriminating against people on the grounds of sex. Indeed, African societies see women "as adjuncts to the group to which they belong, such as a clan or tribe, rather than equals"<sup>40</sup>. This is evident when it comes to marriage, i.e. a communal engagement where economic aspects merge with societal considerations: due to the overwhelming importance of the group, it constitutes an agreement between families and clans rather than a spousal union. To this extent, modernisation has not favoured any improvement in women's antenuptial conditions: national legislation, which enables Africans to enter into a statutory marriage, usually does not prescribe any forms for the solemnisation of customary-law marriages. Nor does legislation set any age for such a solemnisation but leaves it to customary law. As polygamous marriages are allowed under customary law, national legislation merely presupposes their existence, the continuance of which impedes contracting any valid statutory marriage<sup>41</sup>.

African customary tort law and law of contract have a broader scope if compared to their civil-law and common-law counterparts. On the one hand, tort law protects individuals and groups, as well as their name, integrity and interests – such as familial unity and marital relationships – also from mere vulgar abuse. On the other hand, the law of contract, which also has knowledge of consideration and requires formalities for contractual performances, gives prominence to the group, thus curbing individuals' freedom of contract<sup>42</sup>.

---

<sup>39</sup> X. Blanc-Jouvan, "Development of a New Law Code in Madagascar", *Africa Today*, 11, 1964, p. 7; L. Molte, "Sources et Tendances du Droit Moderne à Madagascar", *Canadian Journal of African Studies/Revue Canadienne des Études Africaines*, 1, n. 2, 1967, p. 123.

<sup>40</sup> M. Ndulo, "African Customary Law, Customs, and Women's Rights", *Indiana Journal of Global Legal Studies*, 18, n. 1, 2011, p. 89.

<sup>41</sup> See s 34 *Marriage Act* 1963 (Zambia); s 1(2) *Marriages Act* 1964 (Eswatini). For example, Nigeria legislation does not set any age for such solemnisation: see the *Marriage Act* 1990 (Nigeria). Namibia, South Africa, Togo, Rwanda and Niger and few other countries explicitly recognise customary marriages. See, among others, s 4(3)(b) Constitution of Namibia; *Recognition of Customary Marriages Act*, 1998 (Act No. 120 of 1998) (South Africa).

<sup>42</sup> See, respectively, D.N. Dagbanja, "Customary tort law in Sub-Saharan Africa", in *Comparative Tort law. Global Perspectives*, ed. Mauro Bussani and Anthony J. Sebok (Cheltenham: Edward Elgar, 2015), p. 412;

## V. “PLURAL” LAW: AFRICAN LEGAL TRADITIONS

The “subversive potential of comparative legal thinking”<sup>43</sup> has thus allowed us to detect how methodological biases and colonial underpinnings affect the study of African law. This attitude turns out to be a truly Ethnocentric approach, which is apparent in scholarly examination of the different legal strata. This approach is based on the assumption that African law has progressively evolved through various stages with the Western legal paradigm as the natural end point. To this extent, comparative scholars

saw law in Africa as a reflection of law in the early stages of Western civilization. The more or less hidden assumption was that, given the right conditions, African law and society could achieve progress in the manner assumed to be true of the West<sup>44</sup>.

The subversive potential of comparative law has its own strategy, which aims to revise the study of African law. Critical comparative law aims to overturn this perspective and unveils colonial methodological legacies; by adopting the point of view of ‘marginalised’ legal systems, it endorses Africa’s “disengagement from the whole colonial syndrome”<sup>45</sup>. Such a perspective challenges the assumption according to which, in legal cartographies, Africa might be depicted as an indistinct legal whole and a peripheral ‘family’ of sundry legal systems. Undoubtedly, scholars acknowledge that one of Africa’s distinctive features is its intrinsic legal pluralism<sup>46</sup>; when it comes to enquiring into its legal institutions, however, they regularly point to the commonalities among systems rather than delve into a closer analysis of their specific constitutive traits.

Comparative law must critically examine the idea that African law is an indistinct whole, a miscellaneous ‘family’ into which heterogeneous legal systems coalesce. To put it differently: the study of African law moves towards the examination of different ‘African legal systems.’ Scholars might recover Africa’s legal pluralism provided that they take into account the variety of legal substrates, each of which is dominant in a specific area of the continent. The most relevant substrates are: Cape colonial law in Southern Africa; customary law in tropical Africa; Malagasy law in Madagascar. The

---

“Trends on the Harmonisation of Contract Law in Africa”, *Annual Survey of International & Comparative Law*, 13, n. 1, 2007, p. 174.

<sup>43</sup> G.P. Fletcher, “Comparative law as a Subversive Discipline”, *American Journal of Comparative Law*, 46, n. 4, 1998, p. 684. See also H. Muir Watt, “Further terrains for subversive comparison: the field of global governance and the public/private divide”, in *Methods of Comparative Law*, ed. Pier G. Monateri (Cheltenham: Edward Elgar, 2012), p. 270.

<sup>44</sup> J. A. Harrington, A. Manji, “The Emergence of African Law as an Academic Discipline in Britain”, *African Affairs*, 102, p. 113.

<sup>45</sup> P. Hulme, “Including America”, *ARIEL: A Review of International English Literature*, 26, n. 1, 1995, p. 120.

<sup>46</sup> T. Rambaud, *Introduction au droit comparé*, cit., pp. 257-58; R. David et al., *Les grands systèmes de droit contemporains*, cit., p. 483 et seq.; R. Sacco, *Le droit africain: anthropologie et droit positif*, Dalloz-Sirey, Paris, 2009; J. Vanderlinden, “Les droits africains entre positivisme et pluralisme”, *Bulletin de séances de l’Académie royale de sciences d’Oute-Mer*, 46, 2000, p. 279.

Islamic legal tradition coexists with customary law in Somalia and in the Barbary states and is the 'traditional' substrate north of the Sahel region<sup>47</sup>.

Due to its insularity, it is easy to demarcate the Malagasy legal tradition. When it comes to African continental legal systems, however, the demarcation process must be complemented with several criteria. The Sahel region, which marks the transition from Northern Africa to tropical Africa, also denotes a linguistic transition (from Afroasiatic languages in the north to Nilo-Saharan and Niger-Kordofanian languages in the south) and an ethnic transition. Consequently, these criteria supplement the legal criterion, i.e. the boundaries between the countries situated north of the Sahel and those located south of it. Boundaries also mark the transition from tropical Africa and Southern Africa, whose legal substrate is the Cape colonial law, i.e., the jurisdiction stemming from the mixture of Roman-Dutch law and English common law which was applied in the Cape Colony in the nineteenth century. This explains, for example, why Zimbabwe and South Africa share a common legal substrate, but, at the same time, Zimbabwe has strong political ties with Zambia and Malawi, whose legal substrate complements customary law with common law. From 1953 to 1963, indeed, the former British colonies of Nyasaland (Malawi), Northern Rhodesia (Zambia) and Southern Rhodesia (Zimbabwe) joined the Federation of Rhodesia and Nyasaland, that is, a quasi federal-dominion created within the British Empire.

Not only does the variety of substrates reflect the pluralistic mosaic which embeds African legal traditions, but it also accounts for the different legal-historical narratives of Southern Africa, tropical Africa and Madagascar. With the disembarkment of the Dutch flotilla and the creation of a supply base in the Cape peninsula (1652), Roman-Dutch law became the common law of Southern Africa. After the British occupation (1795), the Dutch handed over the Cape colony to the United Kingdom (1806). The 1828 *First Charter of Justice* abolished the civil-law Court of Justice and established a judiciary styled after the English common-law courts: this favoured the blending of Roman-Dutch law and English common law, and Cape colonial law became the legal substrate of both the Boer Republics and Southern African colonies and protectorates<sup>48</sup>. Within the Cape legal tradition, Lesotho is unique in that its customary law was codified. British colonial authorities promoted a codification process which led to the promulgation of the *Laws of Lerotholi*: the code collects Basotho customary law and covers several subject matters, which range from public law to private law. In Lesotho, its status and authority are relevant, albeit subordinate to Western law<sup>49</sup>.

---

<sup>47</sup> On Islamic law as variety of customary law see J.N.D. Anderson, "The Future of Islamic Law in British Commonwealth Territories in Africa", *Law and Contemporary Problems*, 27, n. 4, 1962, p. 617.

<sup>48</sup> See *De Grondwet* 1854 (Orange Free State); *Royal Charter of Natal* 1856 (Natal); *De Grondwet Der Zuid-afrikaansche Republiek*, also known as The Thirty-Three Articles (*Drie en Dertig Artikelen*) of 1844-1849 (Transvaal). On Cape colonial law as the common law of Southern African protectorates territories see: *Order in Council* 3 November 1871 and s 2 *General Law Proclamation 2B of 1884* (Basutoland-Lesotho); *Order in Council* 9 May 1891, *Proclamation* 10 June 1891 and *General Law Proclamation* 1909 (Bechuanaland-Botswana); *Order in Council* 20 October 1898 (Southern Rhodesia-Zimbabwe); *General Administration Act No. 11 of 1905* and *General Law and Administration Proclamation No. 4 of 1907* (Swaziland-Eswatini); *Proclamation No 21 of 1919* which granted the *Roman-Dutch law* «as existing and applied in the Province of the Cape of Good Hope» to South-West Africa-Namibia.

<sup>49</sup> See, among other, L. Juma, "The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho", *Pace Int'l L. Rev.*, 23, n. 1, 2011, p. 92.

Like Lesotho, Madagascar experienced the restatement of Malagasy law, which was promoted by Queen Ranavalona I (1828-1861) before French protectorate (1884) and colonisation (1895-1897)<sup>50</sup>. The establishment of the Kingdom of Madagascar (1824) as a highly centralised independent state undoubtedly favoured the adoption of these pre-colonial collections, which restate pre-colonial customary law in written form.

Finally, in tropical Africa the legal substrate consists of customary law, which coexists alongside 'received' European, i.e. mainly French- and English-derived, legal systems.

## VI. CRITICAL COMPARATIVE LAW AND THE PLACE OF AFRICAN LEGAL TRADITIONS

Although it has always been used as the legal descriptor encompassing all African legal systems, it is then apparent that "African law" is a composite of different legal traditions. To this extent, critical comparative law has allowed us to reappraise the unique variety of African legal traditions, and therefore to draw the boundaries between several different geographical areas within which such a variety coexists alongside European colonial legacies.

Within the variety of African legal traditions, customary-law substrate is a pluralistic mosaic, which mixes up sundry legal arrangements. National constitutions and legislation also entrench customary law. In so doing, not only do they reflect the variety of native laws, but they also provide them with a flexible legal frame within which 'official', i.e. restated, customary law might be revitalised by local and communal variations of 'living' customary law.

Constitutional and statutory provisions on customary law operate as conflict of law rules whereby lawyers and judges might determine the law applicable to a specific community or ethnic group. Between contrasting norms, indeed, conflict of law rules make a renvoi not only to official customary law, but also to living customary laws enacted by the collective legal wisdom. This allows native law to flourish and vary throughout African communities; it also fits the requirements set by the 'superior' Eurocentric legal framework, because customary law, when applicable, is considered as if it were the law of a different legal system. This also accounts for the transnational character of customary law, which is inherent to African legal systems. Seldom does it reflect colonial borders; as "it grows and evolves for and with that [specific] group," it does not reflect a specific territory, but "the group that obeys it"<sup>51</sup>.

Throughout the whole of Africa, judicial dispute resolution plays a meaningful role in allowing 'living' customary law to prosper. This is particularly apparent when we consider how constitutions and

---

<sup>50</sup> The first code was promulgated by Queen Ranavalona in 1828; Queen Radama II enacted a second code in 1862. Queen Rasoheryna promulgated two codes in 1863; Queen Ranavalona II issued a Malagasy-law criminal code in 1869. Two more codes were enacted in 1868 and 1881.

<sup>51</sup> See, *inter alia*, Art. 162 of the 2018 Chad Constitution; Art. 211 of the 1996 South African Constitution; Art. 11(3) 1992 Ghana Constitution (customary law comprises "rules of law which by custom are applicable to particular communities in Ghana"); s 68 *Courts (Amendment) Act* 1967 (Malawi) (conflict of law rule for determining the applicable customary); s 2(b) *Customary Law and Local Courts Act* 1990 (Zimbabwe) ("customary law" means the customary law of the people of Zimbabwe, or of any section or community of such people"); s 258(1) *Evidence Act* 2011 (Nigeria) ("Custom" is a rule which, in a particular district, has, from long usage, obtained the force of law"). On the inherent transnational character of customary law see "Trends on the Harmonisation of Contract Law in Africa", *cit.*, p. 176.

primary legislation accommodate the interweaving of the different legal strata. Firstly, customary courts are often integrated into the European-oriented judicial system, in order to “preserve as much of the traditional customary laws principles as possible, whilst extending the perceived benefits of the received laws”. Secondly, European-oriented judicial systems usually act as reflective judiciaries, and therefore resort to ‘indigenous reasonable test’ which reflect community standards and rules<sup>52</sup>. Thirdly, the proof of living customary law is usually a matter of fact. When, however, a court takes judicial notice of a custom, customary law ceases to be considered as a matter of fact: it is noticed as a matter of law and therefore acts as a binding precedent.

But, the subversive potential of comparative law has an additional strategy. Not only does comparative law give voice to legal systems which have been traditionally disregarded by ‘official’, i.e. mainstream, comparative legal research, but it also aims to overturn this perspective: Therefore, it unveils colonial methodological legacies and discloses some unprecedented connections between African law and Western law.

This is apparent when we consider the role of procedural law in both African legal systems and English common law. In the latter, as Henry Sumner Maine upheld in his *Dissertations on Early Law and Custom* (1883), “substantive law has at first the look of being gradually secreted in the interstices of procedure”. In African law, judicial proceedings consent to expand the scope of customary law. Suffice it to consider s 20(2) of South Africa’s *Black Administration Act* 1927, according to which “The procedure at any trial ... shall ... be in accordance with Black law and custom”. This also allows state law to be infused with traditional communal African socio-legal conceptions; among them, *ubuntu*, which comprises traditional key values, such as ‘restorative justice’, ‘reconciliation’, and ‘humaneness’<sup>53</sup>.

Not only do ‘native’ legal proceedings make living customary law flourish<sup>54</sup>; but Sumner Maine’s predicament also allows us to draw up an intriguing equation between the ‘superior’ English legal system and the ‘inferior’ African customary law. In England, the forms of actions played a pivotal role in the development of the legal system. With a hint of irony, like ‘superior’ English law, native law and custom also adapts through judicial application and enforcement. To put it another way: both systems, irrespective of their ranking, evolve through the depositaries of their respective collective legal

---

<sup>52</sup> On the integration of customary courts into the received legal system see C.M. Fombad, *The Botswana Legal System*, cit., p. 113. See also *Common Law and Customary Laws Act* 1969 (Botswana). For Swaziland see F.R. Whelpton, “The Indigenous Swazi Law of Court Procedure: A Restatement”, *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg*, n. 2, 2005, p. 348. On indigenous standards see A.A. Oba, “The Future of Customary Law in Africa”, cit., pp. 76-78.

<sup>53</sup> D.W. Jordaan, “The Open Society: What Does It Really Mean”, *De Jure*, 50, n. 2, 2017, p. 402. See C. Himonga *et al.*, “Reflections on judicial views of ubuntu”, *Potchefstroomse Elektroniese Regsblad*, 16, n. 5, 2013, p. 369; O. Oko Elechi *et al.*, “Restoring Justice (Ubuntu): An African Perspective”, *International Criminal Justice Review*, 20, n. 1, 2010, p. 73; D.J. Louw, “The African concept of ubuntu and Restorative Justice”, in *Handbook of Restorative Justice. A Global Perspective*, ed. by Dennis Sullivan and Larry Tifft (Abingdon-New York: Routledge, 2006), p. 161. See also S. Bagni, “The constitutionalisation of indigenous culture as a new paradigm of the caring state”, *International Journal of Environmental Policy and Decision Making*, n. 3, 2016, pp. 205-226.

<sup>54</sup> As K.C.S. van der Waal, “Formal and informal dispute resolution in the Limpopo Province, South Africa”, *Anthropology Southern Africa*, 27, n. 3-4, 2004, p. 113: “Benefits [...] include the fact that the customary courts are more open (‘like democracy’) because all adults can participate in them, they are public and they keep traditions alive. A lawyer is not needed since the system is not professionally driven and the fines are not high. The emphasis is on social outcomes rather than on individualising outcomes”.

wisdom, which is “effectively made [by] both legislators and adjudicators” in common law and in African legal systems<sup>55</sup>.

---

<sup>55</sup> See *African Customary Law in South Africa. Post-Apartheid Living Law Perspectives*, cit., pp. 253-54.